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10 **UNITED STATES DISTRICT COURT**
11 **SOUTHERN DISTRICT OF CALIFORNIA**

12 ALBERTO ALATORRE,

13 Petitioner,

14 vs.

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16 WARDEN FIGAROA,
17 Tallahatchie County Correctional
18 Facility, Tutwiler, Mississippi,

19 Respondent.

CASE NO. 13-CV-1622 JLS (MDD)

**ORDER: (1) ADOPTING REPORT
AND RECOMMENDATION;
(2) GRANTING RESPONDENT'S
MOTION TO DISMISS; AND
(3) DENYING A CERTIFICATE
OF APPEALABILITY**

(ECF Nos. 15, 30)

20 Presently before the Court is Respondent Warden Figaroa's ("Respondent")
21 motion to dismiss Petitioner Alberto Alatorre's ("Petitioner") Petition for Writ of
22 Habeas Corpus. (ECF No. 15.) Also before the Court is Magistrate Judge Mitchell D.
23 Dembin's report and recommendation ("R&R") advising the Court to grant
24 Respondent's motion to dismiss. (ECF No. 30.)

25 Federal Rule of Civil Procedure 72(b) and 28 U.S.C. § 636(b)(1) set forth a
26 district court's duties in connection with a magistrate judge's R&R. The district court
27 must "make a de novo determination of those portions of the report to which objection
28 is made," and "may accept, reject, or modify, in whole or in part, the findings or

1 recommendations made by the magistrate judge.” 28 U.S.C. § 636(b)(1); *see also*
 2 *United States v. Raddatz*, 447 U.S. 667, 673–76 (1980); *United States v. Remsing*, 874
 3 F.2d 614, 617 (9th Cir. 1989). However, in the absence of timely objection, the Court
 4 “need only satisfy itself that there is no clear error on the face of the record in order to
 5 accept the recommendation.” Fed. R. Civ. P. 72 advisory committee’s note (citing
 6 *Campbell v. U.S. Dist. Court*, 501 F.2d 196, 206 (9th Cir. 1974)).

7 Here, the parties have failed to timely file objections to Magistrate Judge
 8 Dembin’s R&R. Having reviewed the R&R, the Court finds that it is thorough, well
 9 reasoned, and contains no clear error. Accordingly, the Court **ADOPTS** Magistrate
 10 Judge Dembin’s R&R and **GRANTS** Respondent’s motion to dismiss the Petition.

11 The Court is also obliged to determine whether a certificate of appealability
 12 should issue in this matter. A certificate of appealability is authorized “if the applicant
 13 has made a substantial showing of the denial of a constitutional right.” 28 U.S.C. §
 14 2253(c)(2). When, as here, a petition is dismissed on procedural grounds without
 15 reaching the prisoner’s underlying constitutional claim, a certificate of appealability

16 should issue if the prisoner can show: (1) “that jurists of reason would
 17 find it debatable whether the district court was correct in its procedural
 18 ruling”; and (2) “that jurists of reason would find it debatable whether
 the petition states a valid claim of the denial of a constitutional right.”

19 *Morris v. Woodford*, 229 F.3d 775, 780 (9th Cir.2000) (quoting *Slack v. McDaniel*, 529
 20 U.S. 473, 484 (2000)). Because both of these components are necessary to obtain a
 21 certificate of appealability, the U.S. Supreme Court has encouraged district courts to
 22 address the procedural prong first. *See Slack*, 529 U.S. at 485; *see also Petrocelli v.*
 23 *Angelone*, 248 F.3d 877, 884 & n.6 (9th Cir.2001).

24 Here, jurists of reason would not find this Court’s procedural ruling debatable.
 25 Petitioner’s Petition was admittedly untimely, and Petitioner failed to allege
 26 extraordinary external circumstances entitling him to equitable tolling. A reasonably
 27 diligent petitioner would have filed his petition before the statute of limitations had run
 28 and then sought to amend his petition once he received the evidence sought. In light
 of the facts alleged, no reasonable jurist would find this Court’s dismissal of

1 Petitioner's Petition as time-barred debatable. Accordingly, the Court **DENIES** a
2 certificate of appealability.

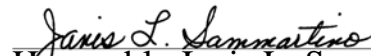
3 **CONCLUSION**

4 In light of the foregoing, the Court (1) **ADOPTS** Magistrate Judge Dembin's
5 R&R in its entirety, and (2) **GRANTS** Respondent's motion to dismiss. The Court
6 **DISMISSES** the Petition **WITH PREJUDICE** because, in light of the Court's
7 determination that the Petition is time-barred, amendment of the Petition would be
8 futile. *See DeSoto v. Yellow Freight Sys., Inc.*, 957 F.2d 655, 658 (9th Cir. 1992) (citing
9 *Schreiber Distrib. Co. v. Serv-Well Furniture Co.*, 806 F.2d 1393, 1401 (9th Cir.
10 1986)).

11 The Court also **DENIES** Petitioner a Certificate of Appealability. This Order
12 concludes the litigation in this matter. The Clerk of the Court shall close the file.

13 **IT IS SO ORDERED.**

14 DATED: August 11, 2014

15 
16 Honorable Janis L. Sammartino
17 United States District Judge
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